

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
September 27, 2012

v

JASON NICHOLAS BIRGE,  
Defendant-Appellant.

No. 305744  
Genesee Circuit Court  
LC No. 10-027384-FH

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Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Defendant was charged with assault with a dangerous weapon (felonious assault), MCL 750.82, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. A jury convicted defendant of a misdemeanor assault and battery, MCL 750.81, and the court sentenced him to time served. Defendant appeals as of right, and we affirm.

Defendant first argues that the prosecutor presented insufficient evidence at trial to support an assault-and-battery conviction. We disagree. When determining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). “[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

“An assault may be established by showing either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery.” *People v Starks*, 473 Mich 227, 234; 701 NW2d 136 (2005). A battery is defined as “an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.” *Id.* (internal citations and quotation marks omitted). It does not matter whether the touching caused an injury. *People v Cameron*, 291 Mich App 599, 614; 806 NW2d 371 (2011).

Here, there was overwhelming evidence that defendant committed an assault and battery against the victim. The victim testified that defendant dragged her up stairs, beat her, kicked her, and threatened to kill her and her family with an AK-47, which he was carrying. The victim’s

two sons corroborated her testimony. The victim testified that she was “scared” and “terrified” during the incident. In addition, defendant admitted that he held the victim down, pulled her hair and “whapped” her. There was evidence that the victim had a split lip and bumps on her head after the incident. This evidence was sufficient to support an assault-and-battery conviction.

Defendant next argues that the trial court erred by instructing the jury regarding assault and battery. We review de novo questions of law arising from jury instructions. *People v McMullan*, 284 Mich App 149, 152; 771 NW2d 810 (2009).

While we agree that MCL 768.32(1) does not permit instructions on cognate lesser included offenses, *People v Cornell*, 466 Mich 335, 354-359; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003), defense counsel waived any error in the jury instructions by indicating her satisfaction with the instructions. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). As noted in *Carter*, *id.* at 217-219, waiver by counsel is available in the context of a broad array of constitutional and statutory provisions, and we conclude that it was available here. “One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.” *Id.* at 215, quoting *United States v Griffin*, 84 F3d 912, 924 (CA 7, 1996). Thus, defendant is not entitled to reversal on the ground that the trial court erred by instructing the jury to consider assault and battery.

Defendant lastly argues that he was denied the effective assistance of counsel because defense counsel failed to object to the assault-and-battery instruction and, in fact, essentially admitted during her closing arguments that defendant was guilty of assault and battery. We disagree.

Because defendant did not request a *Ginther*<sup>1</sup> hearing or a new trial, this Court’s review is limited to mistakes apparent from the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To succeed on a claim of ineffective assistance of counsel, a defendant “must establish (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel’s unprofessional errors, the outcome of the proceedings would have been different.” *Id.* at 659. A defendant must also establish that the proceedings in question were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702; 645 NW2d 294 (2001). In addition, “[a] defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy . . . .” *Sabin (On Second Remand)*, 242 Mich App at 659.

Here, defense counsel likely assented to the assault-and-battery instruction to give the jury an alternative to the higher felonious-assault charge. Given the evidence of the AK-47 presented at trial, defendant has not overcome the presumption that defense counsel’s assent to an assault-and-battery instruction and waiver of the protection offered by MCL 768.32(1)

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

constituted sound trial strategy. Also, in light of defendant's own testimony regarding the incident, including his admissions that he pulled the victim's hair, "whapped" her, and held her down, and his admission that the victim did not want him to touch her, defendant has not shown that defense counsel's comments during closing arguments were improper. Counsel was trying to keep defendant from incurring a felony conviction. Defendant has not shown that he was denied the effective assistance of counsel.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Patrick M. Meter

/s/ Christopher M. Murray